Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KAREN KARCHER,
Petitioner,

v.

EMERSON ELECTRIC CO.,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that an employer's intentional discrimination and intentional retaliation are insufficient, without some additional showing, to show "malice or reckless indifference to federally protected rights" so as to support an award of punitive damages under Title VII?

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OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on September 4, 1996, is officially reported at 94 F.3d 502 (8th Cir. 1996). A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on September 4, 1996. Plaintiff Karcher filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The Court of Appeals denied the petition on November 13, 1996. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 102 of the Civil Rights Act of 1991 amended 42 U.S.C. §1981 as follows:

> A complaining party may recover punitive damages under [Title VII of the Civil Rights Act of 1964] against a respondent. . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

See 42 U.S.C. §1981a(b)(1).

STATEMENT OF THE CASE

The Petitioner, plaintiff Karen Karcher, worked as a machinist for the Respondent, defendant Emerson Electric Company, for close to twenty years. Since July 1978 she worked in the machine shop of its Alco Controls division, which makes refrigerator parts.

There are two types of hourly employees in the machine shop: set up workers, who calibrate or "set up" the machinery that is used in making parts, and operators, who run the machines once they are set up to actually produce the parts. The set up jobs are considered more highly skilled and pay more than the operator jobs. Ms. Karcher was an operator.

In 1988, Emerson began purchasing new, computerized machinery for use in the Alco division. While the old machinery was set up manually, the new machines were set up by computer. The company classified this skilled position as the "Group 6 set up position" which was responsible for performing the set up work on the new equipment. Like the manual set up positions, the Group 6 set up positions were classified higher and paid more than the operator positions.

Between 1988 and 1994, the company promoted 26 hourly employees into Group 6 set up positions. Although at least one third of the hourly work force in the division was female and women applied for the promotions, all 26 of the employees selected for promotion were males.

Ms. Karcher was one of the women who was rejected for promotion. On numerous occasions she competed for open Group 6 set up positions. Each time she was passed over in favor of a male employee.

The company contended that experience setting up the old manual machines was a prerequisite for promotion to a Group 6 set up position. This alleged criteria, however, had little to do with selecting qualified candidates and more to do with reserving the higher paying set up positions for male employees. For one thing, setting up the new computerized machines was substantially different, and the skills used in setting up the old manual machines were not transferable to it. Indeed, the men who were promoted to the Group 6 set up positions were given three weeks of full time training on the new machines, regardless of their previous experience. In addition, at the time Emerson

claims to have established the prerequisite of prior set up experience, no women had ever held manual set up jobs in the Alco division. The company knew that making manual set up experience a prerequisite would effectively bar women from the new positions. Moreover, in the six years *after* the prerequisite was established - up to the trial of this lawsuit — the company continued to exclude women from manual set up jobs, so none could become "eligible" for a Group 6 set up promotion. Finally, the company *ignored* its alleged selection criteria when doing so benefitted males. One man who had no prior set up experience was promoted, while a woman who had eleven years of set up experience at another company was passed over in favor of another man.

Ms. Karcher protested the company's failure to promote her by filing a Charge of Discrimination with the EEOC, by filing a grievance with her union, and by attempting to meet with the division president. Emerson responded to her protests of the discrimination by committing two separate acts of retaliation against her.

First, the company struck at Ms. Karcher by forcing her husband, who also worked in the Alco division, to leave his job. Jerry Karcher's supervisors called him into a meeting and told him that "since your wife has these lawsuits and cases pending against us, we feel that we are going to give you sixty days to find another job." The company generated two written memoranda which reflected its retaliatory motivation. A month later the supervisors again threatened his job. Jerry Karcher found other employment and resigned.

Next, the company attacked Ms. Karcher directly. When Ms. Karcher signed up for a company-sponsored bingo game which her supervisor told her was mandatory, the company claimed, falsely, that she was ineligible to participate and charged her with "falsifying company documents". Company officials called Ms. Karcher into a meeting over this alleged infraction, threatened to

fire her, made her wait a week to learn her fate, and finally issued her a written "Last and Final Warning". A male employee — who did not have outstanding charges of discrimination against the company — also participated in the bingo game despite his ineligibility. The company did not discipline him at all.

Ms. Karcher filed this lawsuit alleging sex discrimination and retaliation in violation of Title VII and the analogous Missouri Human Rights Act. A jury found that the company intentionally discriminated against Ms. Karcher on account of her sex when it denied her promotion to the Group 6 set up positions, and that it intentionally retaliated against her for protesting the sex discrimination by forcing her husband out of the company and by disciplining her in connection with the bingo game. The jury awarded Ms. Karcher $25,000 in lost wages and benefits and $150,000 in compensation for her emotional distress. It also determined that the defendant company's two acts of intentional sex discrimination and two acts of intentional retaliation warranted an assessment of $350,000 in punitive damages.

The Eighth Circuit Court of Appeals upheld the jury verdict in Ms. Karcher's favor but set aside the punitive damage award. The Court held that the evidence was sufficient to prove that the company intentionally discriminated against Ms. Karcher through its "*deliberate* choice to set qualifications which would effectively eliminate all women from obtaining Group 6 set up positions", Appendix at A-12 (emphasis added), by applying the qualifications criteria inconsistently to benefit males, Appendix at A-4 and A-9, and by denying women the opportunity to obtain the allegedly necessary qualifications, Appendix at A-9. The Court further found the evidence sufficient to establish that Emerson committed two separate acts of intentional retaliation against Ms. Karcher for protesting the discrimination. Appendix at A-9 - A-11. Nevertheless, the Court concluded that "there was simply insufficient evidence that Emerson acted 'with malice or reckless indifference to [Karcher's] federally protected rights',

as required under Title VII". Appendix at A-12. The Court did not explain what additional evidence Ms. Karcher should have presented to support the punitive damage award.

The basis for federal jurisdiction in the trial court was 28 U.S.C. §1331, 28 U.S.C. §1343 and 28 U.S.C. §1367.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The Eighth Circuit held that employees who successfully prove that their employers intentionally discriminated against them, and intentionally retaliated against them for opposing the discrimination, cannot recover punitive damages under Title VII unless they make some unspecified "extra showing". Because this holding raises an important issue concerning the proper interpretation of the Civil Rights Act of 1991 which will impact on almost all Title VII cases, and because it conflicts with several federal appellate court decisions as well as a decision of this Court, this Court should grant Plaintiff Karcher's petition for certiorari to review it.

Congress decided in the Civil Rights Act of 1991 that employers should be liable for punitive damages under Title VII if they act "with malice or with reckless indifference to the federally protected rights" of their employees. 42 U.S.C. §1981a(b)(1). The text, purpose and legislative history of the Act make clear that Congress wanted punitive damages under Title VII to be determined under the same legal standards that apply under 42 U.S.C. §1981. Congress amended Section 1981, rather than Title VII itself, to authorize such damages. *Id.* Its purpose was to ensure that victims of the kinds of intentional discrimination covered by Title VII, such as sex discrimination, would be able to recover punitive damages on the same basis as victims of race discrimination under Section 1981. H.R. Rep. No. 102-40 (II), 102d Cong., 1st Sess. 24-29 (1991). The legislative history of the Act leaves no doubt that Congress wanted the courts to look to federal caselaw decided under Section 1981 to determine the legal standards for punitive damages under Title VII:

> Punitive damages would also be available where the respondent. . . engaged in an unlawful employment practice with malice, or reckless or callous indifference to the

> federally protected rights of others. This language sets the same standard courts have applied under Section 1981.

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. 74 (1991) (citations of federal appellate court decisions omitted). In addition:

> Punitive damages are available under [Title VII] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. §1981. No higher standard may be imposed.

Rep. Edwards' Interpretative Memorandum, 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991).

The federal courts which have addressed the question, as well as the Equal Employment Opportunity Commission (EEOC), have agreed that the goal of Congress was to unify the law under Title VII and Section 1981 with respect to punitive damages. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 941 (5th Cir. 1996); EEOC Policy Guide on Compensatory and Punitive Damages, EEOC Comp. Man. (BNA), 405:7091, 7099 (July 7, 1992).

All this is clear and incontestable. The problem is that the federal courts of appeal are sharply divided over whether punitive damages can be awarded under Section 1981 with no additional evidence beyond that adduced for liability. On the one hand, the Fifth and Sixth Circuits have taken the position that some "extra showing" beyond intentional discrimination is necessary. According to the Sixth Circuit:

> After scrutinizing the record, this court concludes that, while the plaintiff presented sufficient evidence to submit to the jury the issue of intentional discrimination. . . no testimony was adduced evidencing the requisite malice or reckless or callous indifference of an egregious character

> on the part of either defendant as to support a jury verdict imposing punitive damages.

Beauford v. Sisters of Mercy-Province of Detroit, 816 F.2d 1104, 1109 (6th Cir. 1987); *see also Jones v. Western Geophysical Co.*, 761 F.2d 1158, 1162 (5th Cir. 1985). On the other hand, the First, Eighth and D.C. Circuits have taken the exact opposite position. They have concluded that intentional discrimination, by its very nature, is malicious and warrants an award of punitive damages without any "extra showing". According to the First Circuit:

> Can it really be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?

Rowlett v. Anheuser-Busch, 832 F.2d 194, 205-06 (1st Cir. 1987). According to the D.C. Circuit:

> An employee's right to employment free from racial discrimination is one of the most widely recognized and protected civil rights. As the Supreme Court has explained, evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages, provided the jury in its "discretionary moral judgment", *Smith v. Wade*, 461 U.S. at 52, finds that the conduct merits a punitive award. (citations omitted). No additional evidence is required.

Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C.Cir. 1995); *see also Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1246-47 (8th Cir. 1983).

The conflict in the Circuits did not escape this Court's attention. A year ago, it granted certiorari in the *Barbour* case to answer the question whether the standard for punitive damages is the same -- or higher -- than the standard for liability in Section 1981 cases. *Merrill v. Barbour*, 64 U.S.L.W. 3500 (Jan. 19, 1996). Although the Court dismissed the case a little over a

month later, because the parties settled it, the fact that it granted certiorari in the first place shows that the question is an important one worthy of its review. *Id.* at 3593 (Feb. 28, 1996).

The disagreement among the federal courts of appeal, once confined to Section 1981, has predictably expanded to Title VII. Several appellate courts, in particular the Fourth, Sixth, Eighth and Eleventh Circuits, have expressly or implicitly held that intentional discrimination is an insufficiently culpable state of mind for punitive damages under Title VII. According to these courts, "additional evidence" is necessary. *See, e.g., Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996); *Pandazides v. Vir. Bd. of Educ.*, 13 F.3d 823, 830 n. 9 (4th Cir. 1994). Going the other way, however, is the Seventh Circuit which recently held in a retaliation case that an employer who intentionally violates Title VII can be held liable for punitive damages without the need for any "additional evidence". *Merriweather v. Family Dollar Stores*, 1996 WL 738715 at 8-9 (7th Cir. Dec. 26, 1996). In reaching this conclusion, the Court relied heavily on the D.C. Circuit's decision in *Barbour*, quoting it for the proposition that "evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the factfinder to award punitive damages. . . No additional evidence of reckless indifference is needed." *Id.* at 8-9.

The Seventh Circuit in *Merriweather* also relied heavily on this Court's decision in *Smith v. Wade*, 416 U.S. 30 (1983), a case brought under 42 U.S.C. §1983. In *Smith*, the Court rejected the argument that "the threshold for punitive damages should always be higher than that for liability in the first instance". *Id.* at 38. It held that an intentional violation of Section 1983 suffices, without any additional showing, to justify a punitive damage award:

> Reckless or callous disregard for the plaintiff's rights, *as well as intentional violations of federal law*, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages.

Id. at 51 (emphasis added). The Seventh Circuit correctly held that the same rule applies under Section 1981 since, as this Court has explained, Section 1981 and Section 1983 are "legislative cousins" and must be construed in harmony with each other. *Gen. Building Contractors Assn. v. Penn.*, 458 U.S. 375, 389-90 (1982). Moreover, the Seventh Circuit correctly held that the same rule applies under Title VII:

> *Smith v. Wade* was decided under 42 U.S.C. §1983. We have previously recognized that its rationale applies equally to cases under §1981. . . It is similarly applicable to Title VII, since the Civil Rights Act of 1991, which made punitive damages available in Title VII, tracks the language of *Smith v. Wade*.

Merriweather, 1996 WL 738715 at 11 n. 2. The legislative history of the Civil Rights Act of 1991 confirms this conclusion. The House Reports cite *Smith v. Wade* — not once but twice — as setting forth the proper standard for punitive damages under Title VII. H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. 74 (1991); H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. 29 (1991).[1]

[1] As the Seventh Circuit recognized, a jury which finds intentional discrimination or retaliation *may* assess punitive damages, but it is not *required* to assess them. Thus, punitive damages are not automatic in every case. The jury must still make a "discretionary moral judgment" whether such damages are warranted in light of all the circumstances of the case. *Id.* at 9, citing *Smith v. Wade*. Once it elects to award punitive damages, however, its decision is immune from further judicial review. The finding of intentional discrimination or retaliation is sufficient, without more, to support it. This does not mean, of course, that the *amount* of punitive damages is immune from judicial review. The amount is reviewable under traditional legal standards. *BMW of N.A., Inc. v. Gore*, 116 S.Ct. 1589, 1598-99 (1996).

The Seventh Circuit's holding in *Merriweather* that the standard for punitive damages in Title VII cases is the same as the underlying standard for liability, following the reasoning of the D.C. Circuit in *Barbour*, is commendable in terms of logic, fairness and common sense. Courts, administrative agencies, and commentators agree that intentional discrimination is reprehensible, in and of itself, and that punitive damages are warranted to punish it and deter its repetition. As this Court has pointed out, it is a "profound wrong of tragic dimensions". *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). The EEOC has declared that "conscious, purposeful discrimination may be sufficient to warrant punitive damages", EEOC Policy Guide, supra, at 405:7100, and a commentator has observed:

> A court which determines that the defendant intentionally discriminated is simply wrong to find that the facts are insufficient to support an award of punitive damages. The award of punitive damages should be presumptively appropriate in all cases in which the defendant intentionally discriminated. The defendant has acted "maliciously", with "ill will", "recklessly", "purposefully", "callously", "willfully" and "outrageously" in intentionally treating the plaintiff differently because of her race, sex, religion, color, or national origin.

Johnson, *A Standard for Punitive Damages Under Title VII*, 46 Fla. L. Rev. 521, 561 (1995).

It is hard to believe that Congress, which enacted the Civil Rights Act of 1991 to expand the rights and remedies of victims of intentional discrimination, did not share these sentiments. Indeed, it expressly authorized punitive damages against employers who are merely reckless, as opposed to malicious, in bringing about discrimination. 42 U.S.C. §1981a(b)(1). An employer would be reckless, for example, if it had good reason to believe that a woman was being sexually harassed by a male

co-worker in its workplace but failed to take effective remedial steps to stop it. Recklessness, of course, requires a less culpable state of mind than specific intent to discriminate. If reckless conduct is sufficient to subject an employer to punitive damages under Title VII, then intentional conduct must be sufficient also. It would not make any sense to hold an employer liable for punitive damages when it recklessly allows a woman to be sexually harassed but not when it willfully discriminates against that woman by, for example, denying her promotions because of her sex.

The reasoning of those federal courts of appeal which have adopted the "additional evidence" standard for punitive damages has been shallow or non-existent. The Eighth Circuit's decision in the present case is a good example. The Court did not analyze the text, purpose or legislative history of the punitive damage provision of the Civil Rights Act of 1991 or this Court's decision in *Smith v. Wade*. Instead, it simply assumed, without any analysis, that a "showing of more than intentional discrimination is required to recover punitive damages" under Title VII. Appendix at A-13. Like other federal courts of appeal, the Eighth Circuit seemed unaware or uninterested in the fact that Congress wanted the standard for punitive damages under Title VII to mirror the standard for punitive damages under Section 1981. Had it recognized this fact, it would have reached a completely different result. It would have affirmed, rather than reversed, the punitive damage award because it had previously ruled in another case that intentional discrimination is sufficient, *without more*, to sustain an award of punitive damages under Section 1981. *Block*, 712 F.2d at 1247-48, relying on *Smith v. Wade*.[2]

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[2] As things stand now in the Eighth Circuit, intentional discrimination is enough to justify punitive damages under Section 1981 but not enough to justify punitive damages under Title VII. This anomaly is intolerable. Congress wanted the same standard to apply under both statutes.

Although these federal appellate courts have insisted upon some extra showing beyond purposeful discrimination before they will uphold a punitive damage award, they have been unable to define what this extra showing might be. This is not surprising, since the operative state of mind for disparate treatment, which is intent to discriminate, is the most culpable state of mind possible under Title VII. *No extra showing is possible.* To require the plaintiff in an employment discrimination case to prove more than purposeful discrimination is to require the impossible. As a result of their failure to come to grips with this reality, the lower federal courts have rendered a series of decisions which are incoherent, confusing and inconsistent.

The disarray in the Circuits is striking. One court has suggested that intentional discrimination, once proved, must be "egregious" before punitive damages can be awarded. However, it did not explain why intentional discrimination is not itself egregious. *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1126 (7th Cir. 1996). Another court has suggested that it is not enough that the intentional discrimination is egregious; it must be "sufficiently egregious". However, it did not explain what this means. *Beardsley v. Webb*, 30 F.3d 524, 531 (4th Cir. 1994). According to one court, the plaintiff must prove the intentional discrimination with direct, as opposed to circumstantial, evidence before punitive damages can be recovered. *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 637 (7th Cir. 1996). Apparently this court believes that employers can intentionally discriminate against women and other protected groups, and avoid liability for punitive damages, as long as they are not too obvious about it. However, this Court has ruled that direct and circumstantial evidence are equally valid and probative in employment discrimination cases. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3 (1983). Yet another court, citing a district court decision, has defined "malice" as actual intent to harm, *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996),

even though this Court rejected such a definition as overly strict in *Smith v. Wade*, 461 U.S. at 37 n.6, 39 n.8.

Most courts have not even tried to articulate a standard or principle to define what additional evidence is necessary to justify a punitive damage award under Title VII. Many have engaged in a freestyle impressionistic review of the facts in the case, arbitrarily and haphazardly selecting certain facts as important and rejecting others as unimportant. *Patterson*, 90 F.3d at 943; *Beardsley*, 30 F.3d at 531; *Turic*, 85 F.3d at 1216. Others, such as the Eighth Circuit in this case, have not bothered to discuss the facts at all. They have simply asserted, in a conclusory fashion, that the plaintiff failed to satisfy the additional evidence requirement. *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809-10 (5th Cir. 1996); *Varner*, 94 F.3d at 1214.

These cases make clear that the lower federal courts are in dire need of authoritative guidance from this Court in order to restore order and coherence to the law. The legal test they have been employing — that the plaintiff must make some "extra showing" beyond intentional discrimination to recover punitive damages — is hopelessly vague and infinitely manipulable. Nobody knows what it means. There is no meaningful content to the test, and it is doubtful that any meaningful content can be given to it. Its formlessness confers on appellate court judges the kind of standardless discretion which inevitably leads to resolution of cases "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application". *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The current state of affairs threatens to deliver lottery-like outcomes in employment discrimination cases with punitive damages being approved or disapproved on appeal depending, not on fixed and ascertainable legal standards, but on the personal values and predilections of individual appellate court judges. Even if this Court believes that some "extra showing" is required under Title VII, it should grant certiorari in this case to clarify exactly what

"extra showing" is required. Without such guidance, punitive damage awards will continue to be subjected to a case-by-case, panel-by-panel evaluation with appellate judges free to substitute their opinion for that of the jury.

Such a result frustrates the will of Congress. Congress wanted juries — not judges — to decide whether punitive damages are appropriate in Title VII cases. 42 U.S.C. §1981a(c). Representative Edwards, co-sponsor of HR-1 (House Bill) and Chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee which was responsible for HR-1, made this clear when he stated:

> The sponsors recognize the limited role of the judiciary in reviewing jury awards and intend that only this well-established supervisory role be applied to the review of jury awards under [Title VII]. This legislation in no way suggests or authorizes any new or additional judicial authority in this area.

Rep. Edwards' Interpretative Memorandum, supra, 137 Cong. Rec. at H9527. The Eighth Circuit's decision in this case is a disturbing, yet increasingly common, example of excessive judicial activism in the review of punitive damage awards in Title VII cases. Although the Court found there was sufficient evidence to support the jury's findings that Defendant intentionally discriminated and then retaliated against Plaintiff Karcher, it went on to conclude, without analysis, that the same evidence was "simply insufficient" to show any malice or reckless indifference on the part of Defendant. Appendix at A-12. Left unexplained was how Defendant could have deliberately discriminated against Plaintiff, as well as deliberately retaliated against her, without malice or reckless indifference to her rights under Title VII. The Eighth Circuit did not even try to untie this knot in logic.

A final point. One commentator has suggested that there might be a narrow category of cases in which employers inten-

tionally treat their employees differently on the basis of a prohibited criterion but nevertheless reasonably believe in good faith, albeit mistakenly, that they are not violating Title VII. In such cases, the argument runs, the employers should not be liable for punitive damages. Johnson, supra, 46 Fla. L. Rev. at 553-61; *cf. Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1709 (1993). Whatever the merit of such an argument, it has no application to the facts of this case. Defendant repeatedly refused to promote Plaintiff Karcher to the Group 6 set up position because of her sex and, in addition, systematically excluded other women from this position. Moreover, it intentionally retaliated against Ms. Karcher in multiple ways because she challenged its unlawful conduct. Defendant cannot argue, without blushing, that it engaged in such conduct in the mistaken but good faith belief that it did not violate Title VII. Such a contention would be utterly untenable. Retaliation in particular is the sort of nefarious motivation, or evil state of mind, which an award of punitive damages is designed to punish and deter. It is malum in se. Indeed, retaliation satisfies the strictest standard for punitive damages — actual malicious intent — because it shows ill will, spite and intent to injure. *Smith v. Wade*, 461 U.S. at 37. As the EEOC has pointed out, "proof of threats or deliberate retaliatory action against complaining parties for complaints to management or filing a charge normally will constitute malice" and thus warrant an award of punitive damages. EEOC Policy Guidance, supra, at 405:7101.[3]

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[3] The present case, unlike the Seventh Circuit's recent decision in *Merriweather*, involves claims of both (1) disparate treatment and (2) retaliation. Because of the diversity of claims in this case, it is an especially attractive candidate for review by this Court. It offers the Court the opportunity to explore the parameters of a punitive damages standard in the context of the two most common claims under Title VII: (1) disparate treatment and (2) retaliation.

CONCLUSION

The Eighth Circuit viewed the evidence in this case through the lens of the wrong legal standard. It incorrectly ruled that "something more" than intentional discrimination and intentional retaliation was necessary to justify the jury's award of punitive damages. This ruling contradicts the intent of Congress and will undermine the deterrent purposes of Title VII in countless pending and future cases in the lower federal courts. It also conflicts with several federal appellate court decisions and this Court's own decision in *Smith v. Wade*. For these reasons, Plaintiff Karcher asks the Court to grant her petition for certiorari to review it. *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965) (certiorari granted because of a conflict among the Circuits and the fact that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues").

Respectfully submitted,

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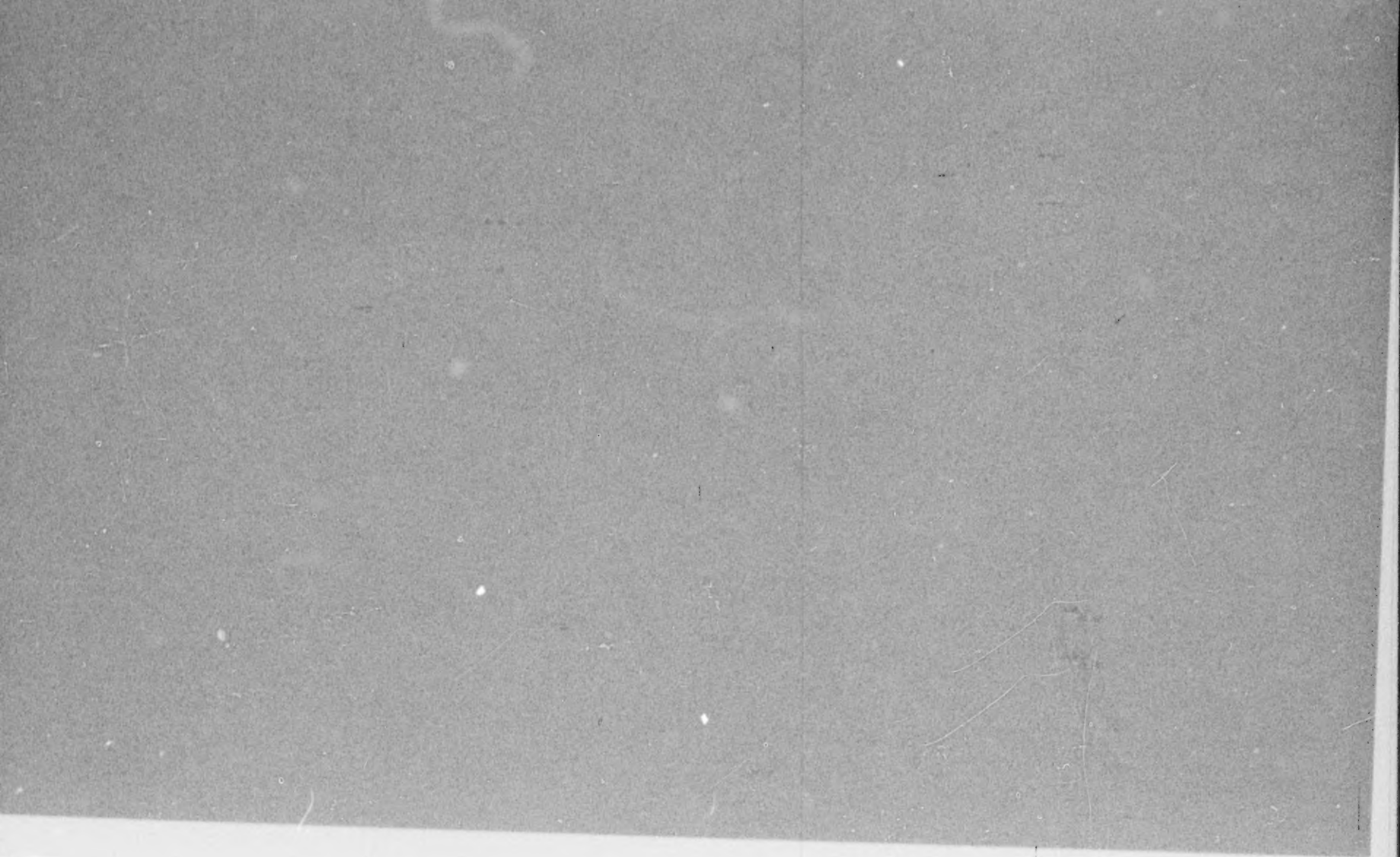
APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3427

Karen M. Karcher,
Appellee,

v.

Emerson Electric Co.,
Appellant

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: May 16, 1996

Filed: September 4, 1996

Before BOWMAN, HEANEY, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Emerson Electric Company (Emerson) appeals the jury verdict in favor of Karen Karcher on her sex and handicap discrimination claims. On appeal, Emerson raises numerous issues relating to the trial, including: 1) that it was entitled to judgment as a matter of law (JAML) on Karcher's failure-to-promote and retaliation claims; 2) that the district court erred in failing to alter or amend the judgment with respect to emotional distress damages and punitive damages; and 3) that it is entitled to a new trial because of erroneous evidentiary rulings and erroneous jury instructions. We affirm in part and reverse in part.

I.

At the time of trial, Karcher was an employee of Alco Controls (Alco), a division of Emerson. Karcher worked at Alco's St.

Louis facility, which manufactures refrigerator parts. The St. Louis plant employs more than three hundred hourly workers, who are represented by District No. 9, International Association of Machinists, AFL-CIO (the union). At least one-third of the union employees are female.

Until 1988, there were only three basic types of equipment in the machine shop, the area of the plant where Karcher worked: manual bar feed machines, manual automatic chucker machines, and numerically-controlled machines. The machine shop used two types of employees, set-up workers and operators. The set-up workers manually calibrated the machines to manufacture a particular refrigerator part and were then responsible for maintaining the machine so that it would produce consistently accurate parts. After the machine was set up, the operators ran the machines by feeding the raw materials into the machine, inspecting the completed parts to determine if they met specifications, and making minor adjustments to the machine, if necessary.

In 1988, Emerson purchased two new computerized bar feed machines called Miyanos and two new computerized automatic chucker machines called Pumas. Rather than requiring manual setup as the old machines did, these machines were set up by computer. Thus, where the adjustments in the tooling had previously been made by hand, the set-up person could now make these adjustments by simply pushing buttons on a computer.

Because no plant employee knew how to program or set up the new machines, Emerson initially hired someone outside the company to perform these tasks and to teach these skills to selected male Emerson employees. After Emerson installed the new machines, union and company officials met to negotiate a job classification, wage rate, and selection process for the new set-up jobs. Although the parties dispute the results of this meeting, they agree that the new jobs were classified as "Group 6 general machine shop set-up" (Group 6 set-up positions).

This classification required the employee holding the position to be able to set up any machine in the plant. No Emerson employee was capable of doing this, however, so the parties were required to further negotiate the qualifications for the job. The collective bargaining agreement in place at the time provided that new jobs should be filled "with seniority being the deciding factor, where skill, ability, and physical fitness of the employees' [sic] being considered are relatively equal." This rule could not be applied in a straightforward manner to the Group 6 set-up positions, however, because no employee had direct experience setting up the machines, and the parties disputed what indirect experience would be helpful in undertaking these new jobs.

Both Karcher and Emerson offered the testimony of witnesses who were present at this initial union-employer meeting. One of Karcher's witnesses, Grady Scott (Karcher's step-father), testified that it was his understanding that the new positions would be awarded based solely on seniority. Another of Karcher's witnesses, Tom Bonzo, testified that the positions were to be awarded to the senior bidder with at least six months experience in a machine shop. On the other hand, two of Emerson's witnesses testified that Miyano setup would require prior set-up experience on bar feed equipment and that Puma setup would require prior set-up experience on automatic chuckers. Emerson's witnesses also agreed that workers with prior set-up experience on the old numerically-controlled machines would be qualified to set up both Pumas and Miyanos. According to these witnesses, the senior bidder with the appropriate set-up experience would be awarded the job.

Karcher was hired by Emerson on March 19, 1976. From the time she was hired until the time of trial, she held a variety of jobs at Emerson, including assembler, manual automatic chucker machine operator, drill press operator, bench lathe operator, welder, and tester. Her experience included operating numerically controlled machines and inspecting and finishing parts that

had been machined. None of these jobs, however, involved set-up work.

On September 11, 1978, Karcher became the only woman to work in the automatic screw machine department. Although this position was not primarily a set-up position, she began learning some set-up skills on an automatic screw machine while she held this job. On October 23, 1978, she was removed from this job even though she was having no difficulty learning setup on the screw machine.

Karcher applied for two Group 6 set-up positions, one that was posted on October 18, 1990, and another that was posted on February 4, 1992. Karcher was near the top of seniority on the list of applicants for both of these positions. Ten Emerson employees, including Karcher, bid on the first position, with Karcher being the second most senior bidder. Both the most senior bidder and Karcher, as well as the next two senior bidders, were determined to be "not qualified" for the position. Bill Pearson, the fifth senior bidder got the job. Pearson had bar feed set-up experience on the turret lathe as well as trade schooling. The fourth senior bidder, Anna Ryan, was determined to be not qualified despite her set-up experience with another company. Karcher filed charges with the EEOC and the Missouri Commission on Human Rights with respect to the denial of this promotion. Nine employees, including Karcher, bid on the second job. The senior bidder, after being determined to be not qualified, withdrew his bid. Karcher, the next senior, was again determined to be not qualified. A male employee was given the job.

Between 1988 and 1994, Emerson awarded twenty-six Miyano and Puma set-up positions. All of these positions were awarded to men. Twenty-five of the successful bidders had either set-up experience or experience on the numerically-controlled machines. Grady Scott, however, was awarded a Group 6 set-up

position without having either type of experience.[1] Scott testified that Karcher was more qualified than he was because she had operated numerous machines and equipment.

Karcher's husband, Jerry Karcher (Jerry) was also an Emerson employee, working as a quality assurance supervisor. As part of his job, Jerry was required to attend monthly supervisor's meetings. At these meetings, status reports were presented regarding pending workers' compensation claims and grievances. During the time he held this job, his wife filed at least six workers' compensation claims after being injured on the job in March of 1983. Thus, as part of his job, Jerry attended meetings where his wife's claims were discussed.

In early 1990, Karcher applied for a position in the quality assurance department. Had she been awarded the job, her husband would have been her direct supervisor. At that time, Jerry told his supervisors that were his wife to be awarded the job, he would leave the company to avoid any conflict of interest. When Karcher was informed that her husband would be required to leave the company if she were awarded the job, she withdrew her bid.

In early December of 1991, Karcher learned that another Group 6 set-up position would become available because Scott would be retiring because of ill health. Karcher then attempted to contact Richard Schul, Alco's president, about the potential job opening. Schul refused to see Karcher, informing her that she needed to discuss the matter through the company's chain of command. In response to Karcher's attempt to contact Schul, Jerry's supervisors, Vicki Taylor and Jim Wors, met with him on December 9, 1991, and informed him that they believed that a serious conflict of interest had developed and that he should begin looking for another job. According to Jerry, Wors stated at

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[1] Emerson asserted that Scott had set-up experience acquired in the repair shop that he owned. Scott, himself, testified that he had no such experience.

this time that "since your wife has these lawsuits and cases pending against us, we feel that we are going to give you sixty days to find another job."

Although Jerry did not find another job within sixty days, he was not terminated. He continued to work for Emerson until July 1992, when he was offered a job at Cerro Copper Product Company. He accepted this position, which offered a higher salary but fewer benefits.

In January 1994, Emerson instituted a "safety pays" bingo game. The bingo jackpot started at twenty-five dollars and increased one dollar for every day in which there was not a lost-time accident in the plant. Each employee who signed up for the game received a bingo sheet, and each day without a lost-time accident a number and letter were drawn in the typical bingo manner. Any employee who had a lost-time accident on the job was disqualified from playing the remainder of the game and the following round. The bingo sign-in sheet stated, "By signing my name below, I certify I have not had any work-related injuries during the previous game round." In a meeting which Karcher did not attend, Taylor and Wors explained that an employee who suffered an on-the-job injury but did not lose work time as a result thereof would be permitted to play the game if the employee reported the injury to his supervisor.

In January 1994, Karcher visited a doctor for treatment of the recurrence of a work injury that she had suffered on July 14, 1993, and which she had reported to her supervisor at the time. On January 10, 1994, Karcher filed a workers' compensation claim for this doctor visit. Karcher lost no work time in relation to this visit, and she did not report the claim to her supervisor. On January 20, Karcher's supervisor presented the bingo sign-in sheet for Karcher to sign. When Karcher declined to sign it, she was informed that participation in the game was mandatory. Karcher therefore signed the form. The language explaining that

an employee who suffered any work-related injury was not permitted to sign the form was obscured by the top of the clipboard. Karcher was subsequently issued a disciplinary warning for falsification of company records for signing of the bingo form without reporting an injury to her supervisor. The notice warned that any further infractions could result in discharge. Karcher filed a grievance over this report, and it was eventually removed from her file, although the warning remained in effect for most of the remainder of 1994.

On October 24, 1994, Karcher filed this complaint against Emerson, alleging discrimination on the basis of her sex and handicap, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat § 213.111. She alleged four incidents of discrimination: a) two incidents of failure to promote to Group 6 set-up positions based on her sex and b) two incidents of retaliation for her filing charges with the EEOC and the Missouri Commission on Human Rights: threatening to fire her husband and forcing him to leave the company and disciplining and threatening to discharge her with respect to the bingo game.

The jury returned a verdict for Karcher, awarding her $25,000 for lost wages and benefits, $150,000 for emotional pain and suffering, and $350,000 in punitive damages. Emerson filed a motion for judgment notwithstanding the verdict, for a new trial, and to amend the judgment, which the district court denied.

II.

Emerson first claims that it was entitled to JAML on Karcher's claims of failure to promote. We review de novo a district court's denial of a motion for JAML, applying the same standard as the district court and overturning the verdict only if the evidence, viewed in the light most favorable to the nonmoving party, is

insufficient to support the verdict. *Nicks v. State*, 67 F.3d 699, 704 (8th Cir. 1995).

Emerson attacks the verdict regarding Karcher's failure-to-promote claims on two fronts, first arguing that Karcher failed to establish a prima facie case of sex discrimination, and then arguing that Karcher failed to prove that Emerson's proffered legitimate rationale for its actions was pretextual.[2] We decline to re-engage in the three-step analysis performed by the district court, but instead limit our review to the ultimate factual issue of whether Emerson intentionally discriminated on the basis of the Karcher's sex. *See Parrish v. Immanuel Medical Ctr.*, No. 95-3514, slip op. at 8 n.2 (8th Cir. Aug. 14, 1996); *Winbush v. State of Iowa by Glenwood State Hosp.*, 66 F.3d 1471, 1479-80 (8th Cir. 1995); *Polacco v. Curators of the Univ. of Mo.*, 37 F.3d 366, 369-70 (8th Cir. 1994); *Nelson v. Boatmen's Bancshares. Inc.*, 26 F.3d 796, 800-01 (8th Cir. 1994).

To determine the merit of Karcher's discriminatory failure-to-promote claims, the jury was required to accept either Emerson's explanation that it failed to promote Karcher because she was not qualified or Karcher's claim that Emerson failed to promote her because she was a woman. This determination involved an evaluation of lengthy testimony concerning the company's promotion policies and the qualifications necessary to operate the new computerized equipment.

Emerson attempts to portray the selection process for the Group 6 set-up positions as thoroughly consistent, pointing to

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[2] In a disparate treatment employment discrimination case, the plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination. The burden of production then shifts to the defendant to set forth legitimate reasons for his actions. Finally, if the defendant carries this burden, the plaintiff assumes the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. *Hicks v. St. Mary's Honor Ctr.*, 509 U.S 502 (1993); *Nelson v. Boatman's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994).

Grady Scott as the single example of an employee who was hired without experience either on machine setup or on the numerically-controlled machines. The testimony at trial, however, paints a more ambiguous picture of the selection process. For example, Frank Carter was initially found not qualified for a Miyano job. When he complained to his brother, John Carter, who was the general foreman in the machine shop, he was given the job. In addition, two other male employees were first told that they were not qualified, and then shortly thereafter were deemed to be qualified and given the job.

Moreover, the jury heard evidence from which it could have inferred discriminatory intent on Emerson's part. For example, more than six years after Emerson adopted procedures to choose people for this job, it still had not given any women the experience allegedly necessary to qualify for the job. In addition, from the time Richard Blair, the foreman responsible for choosing several of the disputed positions, was hired in 1986, until the time of trial, no women worked in his department.

We find that the jury reasonably could have inferred from the inconsistent nature of Emerson's selection process and Emerson's failure to select any women or to train women to meet the alleged qualifications of the job that Emerson intentionally discriminated by failing to promote Karcher to a Group 6 set-up position because of her sex. Thus, the evidence supporting a finding of intentional discrimination was sufficient to support the verdict on the failure-to-promote claims.

III.

Emerson claims that it was entitled to JAML on Karcher's retaliation claims. Emerson argues that Karcher lacked standing to assert the rights of her husband and that she failed to state a claim upon which relief could be granted.

To meet the constitutional requirements of standing, a plaintiff "must allege personal injury fairly traceable to the defendant's

allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The evidence, viewed in Karcher's favor, supports a finding that Emerson's dismissal of her husband caused Karcher to suffer both economic and emotional damage. Although her husband received a higher paying job, the job offered him (and thus her) fewer benefits. Moreover, Karcher testified that she felt responsible for causing her husband to leave a job that he liked and that this caused her emotional stress and placed an additional strain on her marriage. The testimony of her psychiatrist and psychologist corroborated Karcher's claims of emotional distress.

Emerson relies on *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994), and *Parsons v. County of Del Norte*, 728 F.2d 1234 (9th Cir.) (per curiam), *cert. denied*, 469 U.S. 846 (1984), for the proposition that it had an unequivocal right to dismiss Karcher's husband when a conflict of interest arose in relation to Karcher's grievances and workers' compensation claims. We find these cited cases to be inapposite, for they involved the question whether a governmental interest in avoiding conflicts of interest outweighs an employee's constitutional right to intimate association. The employees who suffered adverse employment action in those cases did not attribute that action to an impermissible retaliatory motive. Rather, the employees argued that the employers' articulated motive of avoiding a conflict of interest was outweighed by the employees' constitutional right to be married. Thus, the credibility of the employers' explanation was not at issue.

In contrast, Emerson's true motivation was the primary issue to be resolved at trial. Karcher claimed that Emerson's motivation was retaliatory; Emerson claimed that it was motivated purely by the desire to avoid an emerging conflict of interest. The jury heard sufficient evidence from which it could have believed Karcher and disbelieved Emerson.

Emerson also argues that it was entitled to JAML on Karcher's claim that the company retaliated against her by issuing a written warning with respect to the bingo game. The jury heard evidence that Karcher was forced to sign the form, that the warning instructing employees with work-related injuries not to sign the form was concealed at the time Karcher signed it, and that Karcher's injury had not occurred within the relevant six-month period. In light of this evidence, the jury could have inferred that the disciplinary action taken by the company was taken in retaliation for Karcher's grievances and claims against the company.

IV.

Emerson argues that the trial court erred in instructing the jury on Karcher's claim for damages for emotional distress, contending that the instruction was not supported by the evidence, was not limited to the employment practices complained of, and did not require adequate proof of causation. We reject these arguments. In particular, we note that in addition to Karcher's testimony, the testimony of Dr. John Canale, Karcher's treating psychiatrist, and that of Dr. Shirley Salmon, her treating psychologist, tied Karcher's depression and emotional stress to her job-related problems.

We also reject Emerson's claim that Karcher's recovery of emotional distress damages is barred by the Missouri workers' compensation statute. The exclusivity provision of the Missouri workers' compensation statute provides that:

> The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee . . . at common law or otherwise, on account of such accidental injury as death, except such rights and remedies as are not provided for by this chapter. Mo. Rev. Stat. § 287.120.2.

Clearly, this exclusivity provision can not preempt Karcher's federally created right to recover damages for emotional distress under Title VII. Moreover, we decline to read the provision to bar the recovery of such damages under the MHRA absent clear direction from the Missouri courts, and we have found no such direction.

Although Missouri courts have held that the exclusivity provision bars common law tort actions that arise out of incidents covered by the workers' compensation statute, *see, e.g., Hill v. John Chezik Imports*, 797 S.W.2d 528, 531 (Mo. Ct. App. 1990), they have not extended the exclusivity provision to bar suits under the MHRA. Indeed, the language of the MHRA appears to preclude any such finding. The statute states, in relevant part, that:

> The provisions of this chapter shall be construed to accomplish the purposes thereof and any law inconsistent with any provision of this chapter shall not apply.

We interpret broadly the remedial purpose of the MHRA, and we conclude that an award of emotional damages under the statute is not foreclosed by the possibility that such damages would have been recoverable under the workers' compensation statute.

We agree with Emerson that the punitive damages claim should not have been submitted to the jury, for there was simply insufficient evidence that Emerson acted "with malice or reckless indifference to [Karcher's] federally protected rights," as required under Title VII, or that Emerson's conduct was outrageous as required under the MHRA. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993) (standard under Missouri law); 42 U.S.C. § 1981a(b)(1) (standard under federal law). To support her punitive damages claim with respect to the failure-to-promote claims, Karcher relies on Emerson's alleged deliberate choice to set qualifications that would effectively eliminate all women from obtaining Group 6 set-up

positions. Moreover, Karcher argues that the retaliatory actions taken by Emerson justify a punitive damages award.

This evidence does not support a finding either that Emerson acted with malice or deliberate indifference or that its conduct was outrageous. *See Nelson*, 26 F.3d at 804 (To recover punitive damages, Missouri law requires a showing of conduct that would "shock the conscience and cause outrage"); *Turic v. Holland Hospitality. Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (duplicitous actions of employees were insufficient to support punitive damages award under Civil Rights Act of 1991); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (a showing of more than intentional discrimination is required to recover punitive damages under Civil Rights Act of 1991). Accordingly, the punitive damages award must be set aside.

V.

We address the remainder of Emerson's claims only briefly. Emerson's contention that Karcher was not entitled to a jury trial on her MHRA claims is foreclosed by our recent decision in *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 231 (8th Cir. 1996). We have examined each of Emerson's claims of evidentiary error, and find them to be without merit. *See Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 134 (8th Cir. 1985) (trial judge has broad discretion regarding the admissibility of evidence).

With respect to Emerson's claims of error relating to the jury instructions, we review the district court's jury instructions for abuse of discretion and on review must determine simply "whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *Sherbert v. Alcan Aluminum Corp.*, 66 F.3d 965, 968 (8th Cir. 1995). We find some merit in two of Emerson's jury instruction claims. First, we agree that the instructions should have included a specific provision on intent. Second, the instructions should have included a specific instruc-

tion on the requirement that plaintiff be qualified for the applied-for positions. Proof of both intent to discriminate and qualification for the applied-for positions is necessary under a disparate treatment theory of sex discrimination. *See Marzec v. Marsh*, 990 F.2d 393, 395 (8th Cir. 1993).

In this case, however, we do not believe that Emerson was prejudiced by the district court's failure to instruct specifically on intent or qualifications. *See Stemmons v. Missouri Dep't of Corrections*, 82 F.3d 817, 820 (8th Cir. 1996). The jury was instructed that to return a verdict for Karcher, it must find that "plaintiff's sex was a motivating factor in defendant's decision." This instruction was sufficient to convey to the jury that unless Emerson's actions were intentional, Karcher could not recover. As to the qualifications issue, Emerson argued in closing that it failed to promote Karcher because she was not qualified. From the instructions given, if the jury believed Emerson that its true reason for failing to promote Karcher was her lack of qualifications for the job, then the jury could not find for Karcher. Thus, Emerson suffered no prejudice from the absence of more detailed instructions, and we find no reversible error. Emerson's challenge to the instruction on Karcher's retaliation claim must likewise be rejected.

That portion of the judgment awarding compensatory damages is affirmed. That portion of the judgment awarding punitive damages is reversed, and the case is remanded to the district court for entry of judgment dismissing that portion of Karcher's complaint.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3427EMSL

Karen M. Karcher,
Appellee,

vs.

Emerson Electric Co.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

AMENDED ORDER

The suggestions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Loken took no part in the consideration or decision of this case.

November 13, 1996

Order Entered at the Direction of the Court
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit